Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

COX COMMUNICATIONS HAMPTON ROADS, L.L.C.,	)	
Complainant,	)	Proceeding No. 15-22
	)	File No. EB-15-MD-001
v.	)	
DOMINION VIRGINIA POWER,	)	
Respondent.	)	

RESPONSE OF DOMINION VIRGINIA POWER TO POLE ATTACHMENT COMPLAINT

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RESPONSE TO POLE ATTACHMENT COMPLAINT

Virginia Electric and Power Company d/b/a Dominion Virginia Power (hereinafter "DVP" or "Dominion"), through its counsel, and pursuant to the Commission's Pole Attachment Rules, 47 C.F.R. §§ 1.1401 *et seq.*, submits this Response to the Complaint of Cox Communications Hampton Roads, L.L.C. ("Cox" or "Complainant") in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

The relief that Cox demands is not authorized under current law. The Commission itself has recognized that the Pole Attachment Act does not require electric utilities – under any circumstances – to construct additional capacity for the benefit of attaching entities. Conversely, an attacher may not demand compensation for fashioning alternate facilities of its own where pole space cannot be made available. Dominion must reclaim space on its own poles to ensure that its electric facilities conform to universal reliability standards, and nothing in the Pole Attachment Act precludes it from doing so. However, because Dominion's poles will not have sufficient space to accommodate *any* communications attachments going forward, Cox now must establish its own alternative locations for its cables.

Dominion has taken all reasonable and necessary steps to assist Cox in identifying suitable options for its displaced attachments and the parties have mutually identified the undergrounding of Cox's cables as the most efficient alternative. Dominion even has offered to reimburse Cox for the cost of removing its communications cables from their current locations. Cox nevertheless has failed to complete work requests now seven (7) months outstanding, and conditioned its cooperation on receiving full compensation for the cost of constructing new underground facilities, for its sole enjoyment. At the same time, Dominion's plans to implement mission critical adjustments to its electric distribution lines remain on hold, as the direct result of Cox's recalcitrance.

The Complaint raises one fundamental legal question: which party – Dominion or Cox – is obligated to bear the cost of expanding existing facilities where pole attachments cannot be accommodated. Cox does not dispute that the poles on which it seeks to maintain its attachments lack sufficient space for that purpose. Cox does not dispute that maintaining its attachments on the poles going forward would create safety violations affecting Dominion's electric utility operations. Cox does not dispute that relocating its communications cables to underground facilities is the lowest cost option for continuing access to the specific locations on Shore Drive where Cox seeks to attach. Cox refuses, however, to undertake the expense of building new plant for its exclusive use. The Pole Attachment Act precludes allocating the cost of expanding pole capacity to the pole owner, and so too must the Commission reject Cox's blatant attempt to discharge its own operating expense on Dominion.

The Complaint attempts to obscure the issue, claiming instead that undergrounding Cox's communications cables is no different than performing rearrangements, as may be required under other provisions of the statute. The Commission has made clear, however, that it not does equate

the common practice of rearranging attachments within an existing space to expanding the space on an existing pole. Cox demands *new* facilities – underground, and physically separated from the poles on which Cox seeks to attach. Therefore, the legal precedent on which Cox relies does not support the extraordinary relief that Cox demands. The Commission has not ordered that existing pole space be expanded under Section 224(h), Section 224(i), or *any* other provision of the Pole Attachment Act and certainly should not do so based on the facts presented here.

II. BACKGROUND AND FACTS

A. The Parties.

Dominion maintains its corporate headquarters at 120 Tredgar Street, Richmond, Virginia 23219. The primary business of Dominion is providing electric transmission and distribution services throughout the Commonwealth of Virginia, including within the City of Virginia Beach. Dominion owns and operates wires, poles, and other infrastructure within Virginia supporting its core electric utility business.

Upon information and belief, Cox is a franchised cable operator offering competitive video, voice, and data services to businesses and residences within the Commonwealth of Virginia.[1] Cox has a general office address of 1341 Crossways Boulevard, Chesapeake, Virginia 23320.[2]

B. The Parties' Pole License Agreement.

Dominion and Cox are parties to a Pole License Agreement, dated September 1, 1984.[3] The Agreement expressly reserves Dominion's right to maintain its poles and to operate facilities on its poles in the manner that is best suited to fulfilling the service requirements of its core

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1 Complaint ¶ 3.

2 *Id.* ¶ 4.

3 Complaint, attached Declaration of James Ruel, Exhibit 1 (Pole License Agreement, dated September 1, 1984 ("Agreement").

electric transmission and distribution business.[4] Under the Agreement, Dominion has no financial obligation to pay Cox for any interference with Cox's operation of its communications attachments arising from Dominion's use of its own poles to support its core electric transmission and distribution business.[5]

On the contrary, the Agreement obligates Cox to, at all times, maintain its attachments in accordance with applicable electrical safety and reliability codes, including, but not limited to the requirements and specifications of National Electric Safety Code ("NESC") and the Reliability Standards of North American Electric Reliability Corporation ("NERC").[6] Consistent with the Pole Attachment Act, Dominion can refuse to permit any attachment by Cox that conflicts with these standards.[7] The Agreement also entitles Dominion to require Cox, at Cox's sole cost and expense, to remove or relocate any attachment that interferes with Dominion's use of its poles, or facilities on its poles, or that otherwise is not in accordance with any applicable codes, specifications, or practices related to Dominion's electric transmission and distribution operations.[8]

C. The Shore Drive Pole Locations.

The dispute between Dominion and Cox relates to two (2) pole locations along Shore Drive, in Virginia Beach, Virginia. At the first pole location, 3601 Shore Drive ("SD-I"), Dominion plans to update the current configuration of its electric distribution line in order to conform to NERC Reliability Standards.[9] At the second pole location, 3657 Shore Drive ("SD-II"), Dominion plans to construct a new "intermediate" pole supporting its existing electric

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4 *Id.* ¶ 8.
5 *Id.*
6 *Id.* ¶ 3.
7 *Id*; *see also* 47 U.S.C. § 224(f)(2).
8 *Id.* ¶ 4(a).
9 Declaration of Michael Graf ¶ 5, attached hereto as Exhibit 1 ("Graf Declaration").

distribution line.[10] Cox currently has an attachment at SD-I but not at SD-II, at which its cable currently traverses the location. As to both SD-I and SD-II, Dominion and Cox agree that the poles will not provide sufficient space to accommodate Cox's attachments going forward in consideration of NESC, NERC Reliability Standards, and other applicable codes, rules, and safety specifications.[11] The parties further agree that relocating Cox's attachment now at SD-I, and Cox's aerial cable now traversing the location of the new SD-II,[12] to new *underground* facilities is the most cost-effective means of enabling Cox to maintain its communications cables in the vicinity of the affected pole locations.[13]

D. The Work of Undergrounding Cox's Communications Cables.

Unlike rearrangements, and other make-ready work that Dominion, as well as Cox and other attachers, routinely undertake to create additional space on an existing pole, converting an aerial communications attachment to underground requires constructing new facilities (off the existing pole), for the sole purpose of maintaining communications cables where pole attachments cannot otherwise be accommodated.[14] At the Shore Drive pole locations, the undergrounding process may include several of the following tasks, *all of which must be performed by Cox*: engineering, obtaining permissions from all affected landowners, boring, trenching, installing new conduit or ducts, removing and relocating Cox's communications cables from their current locations, and then establishing connections to Cox's above-ground network.[15] The new

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10 *Id.*

11 *Id.* ¶¶ 8–10.

12 Because no pole exists at SD-II, as noted Cox maintains no attachment at SD-II. Dominion advised Cox that the pole to be set at SD-II will have sufficient space to accommodate only Dominion's electric transmission and distribution lines, but will not have sufficient space to accommodate any communications attachments. *Id.* at ¶¶ 9–10.

13 The parties also considered the option of expanding Dominion's existing facilities by setting larger, transmission-type poles at the Shore Drive pole locations. However, this option proved to be far more expensive than relocating Cox's communications cables to new underground facilities. *Id.* at n. 8.

14 *Id.* ¶ 11.

15 *Id.* ¶ 12.

underground facilities, once constructed, will be owned and operated by Cox, and will not be accessed by Dominion for any purpose.[16]

Dominion repeatedly has postponed, and must continue to postpone, critical enhancements to its electric facilities until Cox proceeds to remove its communications cables from the Shore Drive pole locations.[17] Over the course of the past seven (7) months, Dominion emphasized to Cox the urgent nature of its work at the Shore Drive pole locations and the significant risk of NERC-imposed penalties in the event that such work could not be completed before the end of calendar year 2014.[18] Although Cox first assured Dominion that it would promptly remove and relocate its communications cable at the Shore Drive pole locations, it was not until the requested deadline that Cox demanded full advance compensation, in the amount of $43,251.89, before it would proceed with the engineering, permitting, construction and relocation work.[19]

E. Escalation of the Parties' Dispute and Executive-Level Discussions.

On July 11, 2014, Dominion requested that Cox remove and relocate from SD-II its aerial communications cable traversing Shore Drive.[20] This request indicated a completion deadline of October 4, 2014, and included remarks that the work specified was essential to Dominion installing new electric distribution facilities at SD-II.[21] The work requested, including undergrounding, was previously discussed between construction planners for each of the parties.[22]

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16 *Id.*
17 *Id.*
18 *Id.* ¶ 13.
19 *Id.*
20 *Id.* ¶ 14.
21 *Id.*
22 *Id.*

On July 17, 2014, Dominion requested that Cox remove its attachment to the pole located at SD-I.[23] Dominion's request indicated a completion deadline by Cox of October 1, 2014. Dominion emphasized that the work specified was essential to adjusting its electric distribution line before year end, as needed to conform to NERC Reliability Standards.[24] The work requested, including undergrounding of Cox's communications cables, was previously discussed between construction planners for each of the parties.[25]

On October 1, 2014, Maria Browne, counsel to Cox, submitted to Dominion a demand for compensation, in advance, for the full cost of undergrounding Cox's communications cables at the Shore Drive pole locations.[26] Cox estimated that the work of: (1) removing its communications cables from the Shore Drive pole locations; (2) constructing alternate underground facilities at the Shore Drive pole locations; and (3) relocating its displaced communications cables would impose a total expense of $43,251.89.[27]

Based on the demand, Dominion understood that Cox would not cooperate in promptly completing the work requested at the Shore Drive pole locations – *unless and until* Dominion paid substantial amounts to Cox. Yet, Cox has not provided any contractual or statutory basis to demand this compensation payment from Dominion. In the face of anything less than Cox's full and prompt cooperation, Dominion would be unable to complete critical adjustments to its electric distribution facilities as needed to conform to NERC reliability standards.

On October 27, 2014, Horace P. Payne, Jr., Senior Counsel, Dominion, responded to Cox's demand, offering, in compromise, that Dominion would reimburse Cox for itemized costs

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23 *Id.* ¶ 15.

24 *Id.*

25 *Id.*

26 Complaint, attached Declaration of James Ruel, Exhibit 2 (Letter from Maria T. Browne, Davis Wright Tremaine to Kelly Mansfield, Dominion Virginia Power (Oct. 1, 2014))("Oct. 1st Browne Letter").

27 Complaint, attached Declaration of Greg Patterson, Exhibit 4 (Attachment A to Letter from Maria T. Browne, Davis Wright Tremaine to Kelly Mansfield, Dominion Virginia Power (Oct. 1, 2014)).

incurred to *remove* (but not relocate) its communications cables from the Shore Drive pole locations.[28] However, on the basis of current law, Dominion indicated that it would not compensate Cox for any costs associated with constructing new underground facilities as an alternate to further use of the poles.[29] Dominion also requested that Cox confirm an extended completion deadline of December 1, 2014, for all work at the Shore Drive pole locations.[30] Dominion reiterated that enhancements to its electric distribution facilities mandated by NERC could not be completed until Cox's communications cables at the Shore Drive locations were removed.[31]

On November 17, Maria Browne, counsel to Cox, responded to Dominion's letter, rejecting Dominion's comprise offer, and again insisting that completion of the work requested at the Shore Drive pole locations was conditioned on Dominion compensating Cox, in advance, for the full cost of undergrounding Cox's displaced communications cables.[32]

On November 20, Brett Heather Freedson, counsel to Dominion, responded to Cox's letter, suggesting that the parties' engage in executive-level discussions, pursuant to 47 C.F.R. 1.1404(k), prior to resorting to mediation or complaint proceedings before the Commission.[33] The executive-level meeting between Dominion and Cox occurred on December 16, 2014.[34]

The parties reached an agreement on December 16. This agreement was documented in a letter dated December 18, 2014, from Brandon Stites of Dominion, to Maria Browne, counsel

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28 Complaint, attached Declaration of James Ruel, Exhibit 3 (Letter from Horace P. Payne, Jr., Senior Counsel, Dominion Virginia Power to Maria T. Browne, Davis Wright Tremaine (Oct. 27, 2014)) ("Payne Letter").

29 *Id.*

30 *Id.*

31 *Id.*

32 Oct. 1st Browne Letter, *supra* note 26.

33 Complaint, attached Declaration of James Ruel, Exhibit 5 (Letter from Brett Heather Freedson, Eckert Seamans Cherin & Mellott, LLC to Maria T. Browne, Davis Wright Tremaine (Nov. 20, 2014)).

34 Graf Declaration ¶ 18.

to Cox.[35] The parties agreed that Cox shall complete all work requested at the Shore Drive pole locations, before March 1, 2015. In turn, Dominion guaranteed compensation to Cox for such work, of an amount up to $43,000.00, upon a final legal determination that Dominion is liable for the cost of constructing alternate underground facilities for those communications cables displaced from the Shore Drive pole locations.[36] Cox has not disputed any representation made in the December 18, 2014 letter.

III. ARGUMENT

A. Dominion's Pole Attachment Practices are Just and Reasonable.

1. Cox Fails to Carry Its Burden of Proof.

The Commission's regulations and precedent make plain that the burden of proof is squarely on Cox.[37] The Commission very recently reaffirmed this standard, concluding that the complainant in a pole attachment complaint proceeding failed on several grounds to meet its burden of proof.[38] Here, Cox has the burden of proving all of the bases for its claims for relief and it has failed to carry that burden.

2. Dominion is Not Obligated to Expand its Existing Plant for the Sole Benefit of Cox.

Under the Pole Attachment Act, and well settled federal court and Commission precedent, a pole owner has no obligation to expand its existing facilities where it is agreed, upon consideration of all applicable safety and reliability codes, that "insufficient capacity" exists to accommodate any request for pole access. In *Southern Co. v. FCC*, 293 F.3d 1338, the 11th

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35 Complaint, attached Declaration of James Ruel, Exhibit 6 (Letter from Brandon E. Stites, Director – Electric Distribution Design, Dominion Virginia Power to Maria T. Browne, Davis Wright Tremaine (Dec. 18, 2014)).

36 *Id.*

37 *See* 47 C.F.R. § 1.1404(f) (complainant alleging that a term in pole attachment agreement is unjust and unreasonable must specify "all information and argument relied on to justify said claim."); *Knology v. Ga. Power*, 18 FCC Rcd. 24615, 24635 (2003).

38 *See Verizon Florida LLC v. Florida Power and Light Co.*, DA 15-187, 2015 WL 569211, ¶¶ 21-25 (EB-14-MD-003, rel. Feb. 11, 2015).

Circuit rejected any conflicting interpretation of this exception to the statute's general pole access mandates, reasoning that 47 U.S.C. § 224(f)(2) would have no effect if utilities were required to expand their plant at the request of third parties.[39] Consistent with the court's determination in *Southern Co.*, the Commission itself acknowledged that Section 224(f)(2) precludes its authority to order an expansion of existing facilities under the circumstances described in the statute.[40] Indeed, the recent orders of the Commission defining the scope of Section 224(f)(2) make clear that the obligation of any pole owner to permit communications attachments ends where sufficient pole space cannot be fashioned through rearrangements, or other conventional attachment techniques.[41] If, and to the extent any pole owner voluntarily agrees to expand its existing facilities, in a manner that is not otherwise required by Section 224, all such new facilities may be subject to negotiated rates, terms, and conditions.

The Commission repeatedly has distinguished circumstances in which routine practices may be employed to maximize useable space available on an existing pole, from circumstances in which no attachment could be accommodated unless the pole is replaced.[42] As to the latter circumstances, the Commission expressly rejected assertions that replacing an existing pole is among the practices that a pole owner must undertake before denying attachment pursuant to Section 224(f)(2).[43] The Commission reiterated its position in 2011, clarifying that its prior order

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39 *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002)("Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third party attachers. When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular pole, duct, conduit or right-of-way").

40 *Florida Cable Telecomms. Assoc. et al v. Gulf Power Co.*, Decision, FCC 11-44, 26 FCC Rcd 6452, 6463, ¶ 26 (2011)("...the FCC lacks authority to order utilities to expand the capacity of their infrastructure to accommodate third parties in situations where it is agreed that that existing capacity is insufficient.").

41 *See, e.g., In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245), *A National Broadband Plan for Our Future* (GN Docket No. 09-51), Order and Further Notice of Proposed Rulemaking, FCC 10-84, 25 FCC Rcd 11864, 11872 ¶ 16 (2010) ("*2010 Pole Attachment Order*").

42 *2010 Pole Attachment Order* ¶16 ("Unlike requiring a pole owner to replace a pole with a taller pole, these techniques [i.e., boxing and bracketing] take advantage of usable physical space on the existing pole."). *See also Florida Cable Telecomms. Assoc.* ¶¶ 24-26.

43 *2010 Pole Attachment Order* ¶ 16.

established no obligation to replace poles, where a taller pole is needed to accommodate an existing or prospective attacher.[44]

The facts here are straightforward: the parties *agree* that "insufficient capacity" exists at the Shore Drive pole locations to accommodate Cox's attachments going forward, upon consideration of all applicable safety and reliability codes.[45] As is acknowledged in the Complaint, lowering the existing electric distribution line at SD-I will result in insufficient clearance between that line, and Cox's attachment, or if Cox lowers its attachment in turn, insufficient ground clearance.[46] At SD-II, the new pole that Dominion plans to install for the purpose of supporting its electric distribution line will not be of sufficient height to support any additional attachments.[47] Therefore, pursuant to Section 224(f)(2), Dominion may decline to permit Cox's attachments both at SD-I and SD-II, and is not obligated to expand its facilities through replacing its poles, or any other means.

The practice of undergrounding, similar to that of replacing poles, constitutes an expansion of capacity that is not required under the Pole Attachment Act. Indeed, Cox demands that Dominion construct entirely new underground facilities – apart from the poles on which Cox seeks to attach – for the sole purpose of supporting communications cables at locations where pole space cannot be made available. Moreover, because Cox would enjoy exclusive use of the

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44 *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245), *A National Broadband Plan for Our Future* (GN Docket No. 09-51), Report and Order and Order on Reconsideration, 26 F.C.C. Rcd. 5240, 5339, ¶ 266 (2011)("...the [2010 Pole Attachment Order] made no findings relative to pole replacement [and] thus... provides no basis upon which to reconsider (or clarify) a utility's obligation to perform pole change-outs, and there is no foundation for making the clarification sought by the Cable Providers.")("*Pole Attachment Reconsideration Order*").

45 The Commission has defined "insufficient capacity" as the absence of usable physical space on a pole. 2010 Pole Attachment Order ¶ 14 (citing *Southern Co.*, 293 F.3d at 1349). Cox has not, at any time, disputed whether its attachments could be maintained on the existing pole at SD-I, or the planned pole at SD-II, and no such allegations are made in the Complaint. *See* Graf Declaration ¶ 10.

46 Complaint ¶ 18; Graf Declaration ¶ 8.

47 Complaint ¶ 17; Graf Declaration ¶ 9.

underground facilities that it demands, at Dominion's sole expense, such relief would create a windfall for Cox.

3. Undergrounding is Not a Rearrangement of Facilities Subject to Section 224(i).

Cox attempts to recast the fundamental legal issue before the Commission from whether Dominion must expand – indeed, *newly create* – capacity to whether Section 224(i) of the Pole Attachment Act requires Dominion to pay for the cost of "rearranging" or "relocating" Cox's attachments. Interestingly, while Cox repeatedly uses the word "relocate" in its Complaint,[48] that word is nowhere to be found in Section 224(i). Cox, perhaps inadvertently, admits as much, correctly quoting the relevant provision in its Complaint, which provides that:

> An entity that **obtains an attachment** to a pole, conduit, or right-of-way shall not be required to bear any of the costs of **rearranging or replacing** its attachment, if such **rearrangement or replacement** is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).[49]

The scope of Section 224(i) is clear: the cost of *rearranging* or *replacing* an *existing* attachment must not be allocated to an attacher that is not the cost causer.[50] Cox's reliance on Section 224(i) therefore fails on several grounds.

First, the unambiguous express language of a statutory provision must be interpreted according to its plain meaning.[51]As Cox states time and again in its Complaint, the attachment at SD-I must be relocated, not replaced or rearranged. In addition, at SD-II, there is as of yet no attachment, so Cox cannot be an entity that "obtains an attachment".

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48 Complaint at 2, ¶¶ 15, 20, 23, 27, 32-34, 38.

49 47 U.S.C. § 224(i) (emphasis added); *see* Complaint, ¶ 32.

50 47 U.S.C. § 224(i).

51 *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'")(Internal Citations Omitted).

Second, the Commission has unequivocally stated that it does not equate capacity expansion with rearranging attachments in an existing space.[52] In the Complaint, Cox demands that Dominion reimburse fully the cost of constructing new underground facilities where Cox's communications cables cannot be attached to the existing pole at SD-I or the new pole at SD-II. The Commission has never applied Section 224(i) to require that the pole owner cover the expense of expanding its existing plant where it is agreed that insufficient capacity exists. The Commission should not do so here, as Cox demands. Just as the Commission is not authorized to order any expansion of pole capacity, it is not authorized to allocate the cost of fashioning new and alternate facilities to the pole owner where an attachment is denied or displaced.

The cases cited in the Complaint underscore that Section 224(i) provides no support to the sweeping relief that Cox demands. Cox for example, relies on *Cavalier Tel.*, which Cox fails to note was vacated.[53] In all events, in *Cavalier Tel.,* the Commission concluded only that pole access could not be conditioned on a new attacher covering the *direct* cost of rearranging attachments already on the pole, or otherwise remediating safety violations caused by third parties.[54] Similarly, in *Knology*, the Commission's particular concern related to the pole owner's billing of make-ready charges intended to cover the *direct* cost of remediating safety violations that occurred before Knology attached to the pole.[55] In neither case did the Commission require the pole owner to expand or replace existing facilities to accommodate new attachments. Here,

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52 *Pole Attachment Reconsideration Order* ¶ 233 ("We do not equate capacity expansion with facility rearrangement **in existing space**.") (emphasis added). *See also, e.g., Florida Cable Telecomms Assoc.* ¶¶ 24, 28 (referring to "rearrangements" as repositioning existing attachments, or using other routine or conventional attachment techniques.).

53 *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, File No. EB-02-MD-005, Order, 17 FCC Rcd 24414, 24420, ¶ 19 (2002).

54 *See Cavalier Tel., LLC v. Virginia Elec. And Power Co.*, Order and Request for Information, 15 FCC Rcd 9563 ¶ 16 (2000) (precluding Respondent from imposing, as a condition to attachment, make-ready costs that were required for the sole purpose of correcting a pre-existing safety violation caused by another entity.)

55 *See Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, ¶¶ 36-39 (2003).

Dominion has not imposed on Cox any direct costs of rearrangement or replacement associated with adjusting Dominion's electric facilities and, in fact, Dominion actually offered to cover the expense of removing Cox's attachment at SD-I.[56]

4. Section 224(h) Does not Mandate Undergrounding of Cox's Facilities.

The Complaint similarly overstates the significance of Section 224(h), suggesting that the Commission may take the unprecedented step of ordering Dominion to construct new facilities for Cox's sole enjoyment merely because the adjustments to Dominion's electric distribution lines at the Shore Drive pole locations were government-mandated.[57] Cox states that Commission precedent holds that Cox "will not be responsible for sharing in the cost of governmentally mandated pole or other facility modification."[58] There is no government mandate here.[59] The industry standards established by NERC impact the operations of all electric utilities, and unlike the local government mandates considered by the Commission, relate directly to the goal of preserving the safety and reliability of existing electric plant, as recognized in the Pole Attachment Act.[60] Indeed, the *only* scenario in which the Commission considered Section 224(h) applicable to requiring that the pole owner cover all costs associated with pole modification was a "road widening" mandated by local government. Cox cites no Commission case – because there is none – applying Section to 224(h) in a factual adjudicatory context, much less impermissibly broadening the Commission's analysis of a road widening hypothetical to safety and reliability standards. Indeed, Cox quotes the Eleventh Circuit in the *Southern Company* decision, which explicitly stated that "utilities must bear the cost of modifying their

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56 Payne Letter, *supra* note 28.
57 Complaint ¶ 35.
58 *Id.*
59 NERC is an association of electric utilities in North America that studied, developed and promoted universal reliability standards.
60 *See* 47 U.S.C. § 224(f)(2).

facilities **in response to local government mandates."**[61] Of further importance, then, to Cox's request that the Commission announce new law in this case, the substantial cost of undergrounding Cox's communications cables at the Shore Drive pole locations could not be one that the Commission intended to allocate to the pole owner in its limited application of Section 224(h).

Where a government mandate necessitates that an existing pole attachment should be modified, the Commission has ordered nothing more than compensation of *incremental costs* that generally are factored into the regulated pole attachment rate.[62] For example, in the case of road widening, the Commission clarified that attaching entities need not share in the cost of removing, relocating, and replacing, *on the same pole*, the attachments impacted.[63] The cost of constructing new underground facilities, for which Cox demands full compensation in its Complaint, cannot be equated to the cost of moving an attachment between pole locations. Moreover, the amount of $43,251.89, which Cox estimates will cover the cost of undergrounding its communications cables,[64] is neither incremental, nor among the costs generally factored into Dominion's regulated pole attachment rate.[65] Finally, Cox has not been asked to modify any attachment to SD-II. It has no attachment there. At bottom, the relief demanded by Cox is not contemplated by Section 224(h).

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61 *Southern Co.*, 293 F.3d at 1352 (Emphasis Added).

62 The Commission's only order interpreting the scope of Section 224(h) refers specifically to **"reasonably projected incremental costs associated with the movement of attaching entities facilities"**, as factored into the standard annual rent. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers* (CC Docket No. 95-185), Order on Reconsideration, 14 FCC Rcd 18049 ¶ 106 (1999).

63 *Id.* Significantly, the Commission has not considered any other scenario in which pole attachments were relocated in response to a government mandate affecting the pole.

64 Cox represented in its Complaint that the total cost of undergrounding its communications cables at the Shore Drive pole locations may be higher than $43,251.89, and thus, has demanded that Dominion true-up this amount upon completion of the work requested.

65 Because it is generally not Dominion's practice to underground its electric plant, no such costs are factored into Dominion's pole attachment rate. Moreover, Dominion's current annual attachment rate is *de minimis* as compared to the expense of $43,251.89, of which Cox demands compensation.

In concluding, Cox suggests that it should not be obligated to remove an attachment, at its own expense, where the attachment has been approved in the application process.[66] However, Cox again failed to meet its burden of proof and presented no documentation confirming that its attachment at SD-I was ever approved in its present location or affirmatively found by Dominion to meet safety, engineering and reliability standards.[67] Moreover, Cox's claim rests entirely on the decisions of state commissions that certified regulation of pole attachments pursuant to state law.[68] The Commission has never concluded that an electric utility is obligated to maintain an approved pole attachment that later is found to violate applicable safety and reliability codes, under Section 224(h), Section 224(i) or otherwise.[69]

5. Dominion is Entitled to Reclaim Pole Space for Use in its Core Electric Utility Business.

Cox simply ignores one final important issue raised by the novel relief it requests. The Commission has long respected that the Pole Attachment Act does not disturb the rights of electric utilities to reclaim leased pole space where an actual business need arises.[70] The *Local Competition Order* expressly acknowledges that the near-universal public demand for service

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66 Complaint ¶ 37.

67 Cox currently does not maintain an attachment at SD-II.

68 *See* Complaint at n. 23. The states of Maine, New York, and Oregon each have certified to the Commission their regulation of rates, terms and conditions for pole attachments, and in so doing, pre-empted application of the Pole Attachment Rules. *Pole Attachment Reconsideration Order* at Appendix C. Accordingly, the state commission cases relied on by Cox provide no interpretation of Section 224(i), but rather, are based on applicable state law. *See, e.g., Central Lincoln People's Util. Dist. V. Verizon Northwest*, 2005 WL 2365897 (Or. PUC 2005) ("The plain language of the statute makes clear that 47 U.S.C. § 224(d)-(i) do not directly apply, and are not directly enforceable, on pole attachments in Oregon..."); *In re Central Maine Power Co.*, 1997 WL 151134 (Me. PUC 1997) ("Maine has exercised jurisdiction, and therefore Section 224(i) does not apply.").

69 Similarly, Cox has failed to carry its burden of showing that somehow Dominion caused safety violations which it now needs to fix. Although Cox makes the bald-faced allegation that Dominion is trying to charge it for "correcting pre-existing non-compliance." Complaint, ¶ 36, Cox presents no evidence to support this claim. Instead, Cox attempts to stretch and mischaracterize emails from Dominion field personnel into admissions. The communications referenced in the Complaint, however, evidence nothing more than Dominion's practice of regularly updating its electric facilities, as industry safety and reliability standards may require.

70 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16053 ¶¶ 1168-1169 (1996) ("*Local Competition Order*").

"entitles utilities certain prerogatives *vis-à-vis* other parties," including the rights to reserve and reclaim pole space, as needed to meet their continuing business demands.[71] Similarly, in *Southern Co.*, the court recognized that use of pole space pursuant to Section 224 is temporary, and therefore, that attachers must be prepared for potential disruptions that may occur where a host utility demonstrates an actual need for pole space that is occupied.[72] Significantly, if an electric utility reclaims pole space for its own use, the *Local Competition Order* directs the displaced attacher – and *not* the electric utility – to bear the costs associated with expanding existing facilities to maintain its attachment.[73]

Consistent with the Commission's directives, the Agreement between Dominion and Cox explicitly reserves the right of Dominion to maintain its poles, and to operate the facilities on its poles in the manner best suited to its electric transmission and distribution business.[74] Further, the Agreement provides that Dominion shall not be liable to Cox for any interruption of, or interference with the operation of its attachments arising from Dominion's use of its own poles.[75] In the event that Cox must relocate its attachments to avoid disrupting Dominion's use of its own pole, or facilities on its pole, the Agreement allocates the cost of such work solely to Cox.[76]

There can be no doubt that Dominion needs to reclaim space licensed to Cox pursuant to a *bona fide* business plan as contemplated by the Commission. Although the Commission has not explained what constitutes a *bona fide* business plan, certainly Dominion's ongoing need and obligation to comply with reliability standards to provide electric service to Virginia qualifies as

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71 *Local Competition Order* ¶ 1168.

72 *Southern* Co., 293 F.3d at 1349 ("All parties will be presumably be aware of the temporary nature of this available space, and attachers will have to be prepared for potential disruptions that may occur when the utility demonstrates an actual need for the space.")

73 *Local Competition Order* ¶ 1169 ("The utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.").

74 Agreement ¶ 8.

75 *Id.*

76 Agreement ¶ 4(a).

such. With regard to the pole located at SD-I,[77] Dominion must reclaim pole space now occupied by Cox's attachment for the purpose of conforming its electric transmission and distribution lines thereon to safety and reliability standards applicable to its core business operations.[78] In the event that Dominion is precluded from performing the work required on the pole at SD-I due to the placement of Cox's attachment, the quality of Dominion's core electric services could be compromised, and further, substantial fines could be levied against Dominion by NERC.[79] Therefore, in accordance with the Agreement, and current federal law, Dominion may require that Cox vacate the pole space currently occupied by its attachment, at Cox's sole expense, to accommodate Dominion's business operations, and to avoid any interference with Dominion's use of its own poles and facilities.

B. Cox's Demand for Relief Must be Denied.

1. Dominion is Not Obligated to Bear the Entire Cost of Undergrounding Cox's Attachments

For the reasons set forth in the preceding sections, Dominion is not obligated to expand its existing plant, through construction of new underground facilities or otherwise, for the sole purpose of accommodating Cox's communications cables at the Shore Drive pole locations. Therefore, the full expense of undergrounding Cox's attachments must be allocated to Cox, and the relief demanded by Cox in the Complaint denied. Even if, and to the extent that the Commission grants the relief demanded (and it should not do so), nothing in the Agreement, the Pole Attachment Rules, or the Commission's orders requires that Dominion reimburse Cox, *in advance*, for costs that Cox incurs to underground its communications cables at the Shore Drive pole locations.

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77 At the present time, Cox maintains no attachment at SD-II. Thus, the question of whether Dominion may reclaim pole space at SD-II is not applicable.

78 Graf Declaration ¶¶ 8–10.

79 Graf Declaration ¶ 13.

2. The Commission Should Render its Decision Only on the Facts in the Complaint.

The pole attachment complaint process is not intended to develop general rules of law, or to otherwise establish binding legal precedent as to facts or circumstances that are not presented for the Commission's consideration. The issue of whether any pole attachment practice should be deemed unjust or reasonable must be concluded on the basis of specific facts, as is illustrated in 47 C.F.R. § 1.1404. The circumstances presented in the Complaint are anomalous, impacting only two poles in Dominion's entire electric plant.[80] Therefore, the Commission's final order deciding the Complaint should be based only on the facts presently before it, and should not prejudge any circumstances that may arise in the future, impacting Cox, or any other attacher on Dominion's facilities. In addition, given the dearth of facts in Cox's complaint and its failure to carry the burden of proof, the Commission must be particularly wary of any attempts by Cox to introduce additional facts or information in its reply to Dominion's response.

3. The Pole Attachment Rules Do Not Permit an Award of Attorneys' Fees or Damages.

Cox's Complaint requests that the Commission award "attorney's fees and any other damages necessary . . . ."[81] The Commission may award attorneys' fees and damages only if such awards are authorized pursuant to its enabling statute.[82] The Pole Attachment Act provides no such authorization, and therefore, the Pole Attachment Rules do not include attorneys' fees or damages among the specific remedies available in complaint cases arising under 47 C.F.R. § 1.1404.[83] Indeed, in the *Pole Attachment Reconsideration Order,* the Commission clarified and restated the enumerated remedies available to a complainant and then specifically declined to modify the applicable pole attachment regulations to allow a monetary award in the form of

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80 Graf Declaration ¶ 5.
81 Complaint at 2.
82 *Turner v. FCC*, 514 F.2d 1354, 1355-56 (D.C. Cir. 1975).
83 *See* 47 C.F.R. § 1.1410.

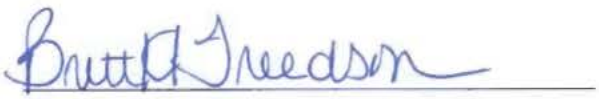
compensatory damages.[84] Therefore, in accordance with federal law, under any circumstances Cox's demand for an award of attorneys' fees and damages must be denied.

IV. CONCLUSION

For the reasons set forth in this Response, Dominion respectfully requests that the Commission issue an order concluding: (1) the practices of Dominion are just and reasonable under the Pole Attachment Act and the rules and orders of the Commission governing pole attachments; (2) Cox is responsible for the full expense of undergrounding its communications cables at the Shore Drive pole locations; and (3) the relief demanded in the Complaint is denied.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY
D/B/A DOMINION VIRGINIA POWER



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February 23, 2015

[84] *Pole Attachment Reconsideration Order*, ¶¶ 107-09.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2015, I caused a copy of the foregoing Response of Dominion Virginia Power to Pole Attachment Complaint to be filed via the Federal Communications Commission's ECFS system and to be served on the following parties by U.S. Mail, electronic mail or overnight mail (as indicated):

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